Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1957.

No. 518.

FRANK M. BRENNAN,
As Treasurer of Cuyahoga County, Ohio,
Petitioner,

vs.

THE UNITED STATES,
Respondent and Third-Party Plaintiff,

vs.

FLORENCE F. FERTIG, JULIA C. DeFRANCO (a.k.a. MRS. ANTHONY DeFRANCO, JULIA FERTIG DeFRANCO), ERMINO DeFRANCO, ANTHONY O. DeFRANCO (a.k.a. ANTONIO DeFRANCO), Individually and as Executor of the Will of MARY MARINO, Deceased, ELMORE C. EGGERT and FREDERICK C. HAHN, Individually and as Guardian of HARTILL HAHN,
Third-Party Respondents.

REPLY BRIEF OF PETITIONER.

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REPLY BRIEF OF PETITIONER.

I. JURISDICTION.

28 U. S. C. 2501, Supp. IV, provides:

> Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

It is submitted that this language has the same meaning as that set forth in the petition for certiorari herein. The claim must be one of which the Court of Claims has jurisdiction. In this case that court had no jurisdiction

until the date of the federal mistake, April 8, 1948. Prior to that date no suit on this claim could have been brought in any court. The statute on this claim therefore started to run on April 8, 1948, because nowhere else could relief be obtained, and the case conforms to the jurisdictional requirements of the Court of Claims Act.

II. COMMENTS ON FACTS ALLEGED IN THE BRIEF OF THE UNITED STATES.

1. Petitioner believes it to be of considerable importance in this case to read the opinion of District Judge Jones in the eminent domain proceeding. This opinion and the facts found by it were ignored by the Court of Claims, erroneously, petitioner contends. The opinion of Judge Jones is attached to petitioner's reply (Rec. pp. 23 to 27) and is also plaintiff's exhibit No. 75. Judge Jones held that the case of *U. S. v. Dunnington*, cited in the brief of the United States, is not applicable to the facts, and why. More of this, under "Argument."

2. Reference, p. 3 of brief of the United States: The County Prosecutor's signing a stipulation to the effect that any taxes levied on the property taken, after the taking, would be null and void was no appearance in the case. It is the law anyway, and it had nothing to do with the merits of the proceeding, or even its incidents.

3. Reference, p. 3 of brief of the United States: The state-county officials were never notified of any of the settlement conferences between the United States Attorneys and the third-party respondents, nor of the money payments to them. The state-county authorities found this out only by pressing the federal attorneys for payment and were told that they would try to get the money to pay the county. That accounts for the time between April 8, 1948 and the filing of suit in the Court of Claims

in the spring of 1953. See petitioner's exhibits Nos. 1 to 68, showing that the county never stopped trying to get its money. See also the testimony of Smolka, Badzik and Frye as to their efforts to collect this money, transcript record of testimony, pp. 178, 179, 180, 187, 188, 239 to 245 incl.

4. Reference, pp. 3 and 4 of brief of the United States: The United States attorneys and the third party respondents all had actual knowledge of the nature, priority, and amounts of petitioner's tax claims. This knowledge was obtained by title examination reports, tax bills delivered to the federal attorneys, and the Ohio statutes charging any transferees of the land with knowledge of the tax liens and their priority. All this information was had by the United States long before the mistaken payment was made. See transcript of testimony, pp. 47, 48, 338, 340, 470, 471 bottom, 481, 482.

5. Reference, p. 4 of brief of the United States: Here the United States attorneys claim that Mr. O'Neil, the local federal attorney handling these cases, had no authority to agree to pay the state-county taxes without making state-county authorities parties to the proceeding. We have shown in our argument in our petition that it is lawful to pay tax lienors claims, on proof, without making them formal parties. In view of those authorities and of the testimony of Messrs. Smolka (transcript of testimony pp. 175, 176, 178, 179, 180, 188, 189) Badzik (transcript pp. 134, 136, 138, 143, 149, 150, 152) Frey (transcript pp. 238, 239, 240, 243, 245, 249, 258, 259) and Brennan (transcript pp. 44, 47, 48, 58, 61, 62, 68) the testimony of Mr. O'Neil, federal attorney, becomes very important, at p. 472, where he said, in speaking of Mr. Brennan, the County Treasurer:

> * * * I had paid him a couple of million dollars in taxes on other cases. I had had these cases for seven or eight years, and, as always, have never formally made the county treasurer or the county auditor a defendant. * * *

He goes on to say that he paid the taxes in all these cases to Mr. Brennan, where no county or state officer was made party to the proceeding. How, then, after having participated in such lawful practice for seven or eight years in many such cases, can the United States be heard to deny Mr. O'Neil's authority now? There is no denial of this practice and no evidence to the contrary. See other pertinent statements by Mr. O'Neil at transcript pp. 474, 481, 482, 489, 492, 493, 496. As to Mr. Chatterton, who negotiated the settlement with the third-party respondents, the transcript shows that he got specific authority from Washington to make the mistaken payments (transcript pp. 312 to 321, esp. at pp. 320 and 321). It is submitted that it is idle for the United States to deny the authority of its attorneys.

III. ARGUMENT.

1. The first point made by the United States is that its attorneys were not authorized to promise payment of petitioner's tax claims We submit that we have already disposed of that contention.

2. The Government's second point is that the obligation of the United States ends with the deposit of money in court and that the United States is not concerned with the distribution of those moneys. *U. S. v. Dunnington*, 146 U. S. 338, 352 is cited. That case and the cases following it hold, in substance, that the United States is not responsible for what courts do, or order done, with compensation money. Those cases have no application here because in this case the federal attorneys—not the judge—disposed of the money by signed agreements between counsel concerned. And in this case the federal attorneys perforce misrepresented the facts to the judge, by mistake, or he never would have signed the orders of distribution, for he is quite familiar with tax liens and their priority. Judge Jones so held in his opinion in the eminent domain proceeding. All these facts in evidence the trial examiner and the Court of Claims ignored. Petitioner claims that to be most prejudicial error.

3. The petitioner contends that whether or not the state-county authorities were parties to the eminent domain proceeding, the United States cannot, even by mistake, violate the provisions of the Fifth Amendment. If it could do so, who would be safe in dealing with the Government which we all trust completely?

4. The United States cannot, by the admitted mistake of its attorneys, compel a sovereign state or an individual to seek an uncertain relief from the people who were wrongfully paid all the compensation money in an

appropriation proceeding. This Court has repeatedly held that just compensation must be paid, barring some form of waiver, estoppel or abandonment of claim. No such thing as waiver, estoppel or abandonment, or failure to follow up the claims occurred here. The Government's obligation under the Constitution is to pay just compensation to those entitled to it, not to just anyone. See language of 40 U. S. C. sec. 258(a).

5. The Government is seeking to shift its liability here over to the third party respondents in a way it is believed the United States would not want and cannot afford to approve. Petitioner claims that his primary rights under these facts are against the United States; that he is not concerned with what happens between the United States and the third party respondents.

6.

> "A statute cannot be sustained as one of limitations where it requires a party, in full possession and enjoyment of property (or property rights) to bring an action within a given time or else forfeit it." 34 *Am. Jur.* p. 29 (words in parenthesis supplied).

IV. CONCLUSION.

For the reasons advanced in the petition and in this reply the petitioner submits that he is fairly entitled to a writ of certiorari.

Respectfully submitted,

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Prosecuting Attorney of Cuyahoga County,

FREDERICK W. FREY,

Assistant Prosecuting Attorney,

Attorneys for Petitioner.